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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 310

FRANK O. LOWDEN, JAMES E. GORMAN AND JOSEPH B. FLEMING, Trustees of the Estate of the Choctaw, Oklahoma & Gulf Railroad Company,
Petitioners,

vs.

THE UNITED STATES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONERS

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STATEMENT

The Respondent in the foot-note on page 5 of its brief in opposition states "The Department of the Interior has consistently held that interest on unpaid installments should begin to run from the date the bids were approved, and has refused to accept interest tendered for the period which elapsed between the date the bids were submitted and the date they were approved (R. 63)". That statement is inaccurate. On December 11, 1919 the Railroad paid the second install-

ment on the purchase price and included therein interest from the date the deposits were sold at public auction. On April 10, 1920, the Superintendent advised the Railroad that he had been instructed by the Assistant Secretary under date of March 26, 1920, to charge interest only from the date of approval of the sale and that in compliance therewith he had credited on the purchase price the excess payment of interest made December 11, 1919, in the amount of $15,080.75 (R. 62, 63).

ARGUMENT

The Respondent in its brief in opposition urges three propositions, namely: (1) That Petitioners' right of action is barred by the six-year limitation provision of the Tucker Act; (2) that Petitioners' cause of action is not within the jurisdiction of the Court of Claims for the reason that the United States was not a party to the contracts involved; and (3) that the claims are without merit.

In view of the jurisdictional questions raised by the Respondent, Petitioners deem it necessary to make this reply.

PETITIONERS' RIGHT OF ACTION NOT BARRED BY THE SIX-YEAR LIMITATION PROVISION OF THE TUCKER ACT.

The Special Findings of Fact and Opinion of the Court of Claims conclusively establish that the Department of the Interior had these claims under advisement and consideration from December 11, 1922, until December 12, 1932, when the Superintendent advised the Railroad that its claims had been finally rejected (R.

66, 72, 78). This instant suit was instituted within six years from the latter date (R. 1). The Act of Congress directed and ordered the Secretary to make the credits involved herein. Until he finally declined to do so Petitioners' right of action did not accrue. *United States* v. *Fletcher*, 147 U. S. 664; *City of New Orleans* v. *Paine*, 147 U. S. 261; *Slocum* v. *United States*, 35 C. Cls. 485; *Utah Power & Light Company* v. *United States*, 67 C. Cls. 602; *Smith* v. *United States*, 67 C. Cls. 182. Nor did the six-year limitation provision of the Tucker Act commence to run while the claims were under consideration or reconsideration by the Secretary. *Watts* v. *United States*, 82 Fed. (2d) 266; *McKesson & Robbins, Inc.* v. *Edwards*, 57 Fed. (2d) 147; *Jones et. al.* v. *United States*, 5 Fed. Supp. 146; *United States* v. *Helvering*, 89 Fed. (2d) 848.

PETITIONERS' CLAIMS BEING FOUNDED UPON CONTRACTS WITH THE UNITED STATES AND UPON THE ACT OF CONGRESS OF FEBRUARY 8, 1918, (40 STAT. 433) ARE WITHIN THE JURISDICTION OF THE COURT OF CLAIMS.

The Respondent argues that the above proposition has been adversely decided by this court in the case of *United States* v. *The Algoma Lumber Company*, 305 U. S. 415. The facts in the instant case clearly distinguish it from those there under consideration and render the opinion inapplicable.

In the *Algoma* case the decision turned on the question whether certain written contracts for the sale of timber on land of the Klamath Indian Reservation in Oregon, entered into between the Superintendent for

the Klamath Indian School for and on behalf of the Klamath Indians, party of the first part, and the Lumber Company, party of the second part, executed pursuant to the Act of Congress of June 25, 1910, were contracts of the United States upon which suits might be maintained in the Court of Claims. Section 7 of that Act provided that the timber "may be sold under regulations to be prescribed by the Secretary of the Interior", and Section 8 provided that the timber on an Indian allotment "may be sold by the allottee with the consent of the Secretary of the Interior." In the present case the Act of Congress of February 8, 1918, (40 Stat. 433) authorized the Secretary to sell the coal and asphalt deposits involved, and directed him to do so within a specified time, giving the Railroad as lessee the preferential right to purchase the deposits upon which it held leases. This Act of February 8, 1918, does not grant mere permission to the Secretary to sell as did the Act in the *Algoma* case, but commands and directs that he must sell within the time and in the manner prescribed. The Secretary was the medium through which the deposits were sold by the United States. Congress having directed the Secretary to sell, having directed that the deposits be offered for sale within a prescribed time, and having given to the lessees the preferential right to purchase, points conclusively to the fact that the United States, acting through the Secretary, was the vendor.

By the very terms of the written contracts involved in the *Algoma* case, the Klamath Indians were parties thereto. In the present case no written contracts were entered into between the parties. The contracts herein consist of the Act, regulations and advertisements. At

no place in any of the documents comprising the Railroad's contracts is it even inferentially intimated that the Indian Tribes were the vendors, but on the contrary, these documents conclusively establish and specifically name the United States as such. When the coal deposits were sold at public auction on December 11, 1918, the Railroad did not enter into any contract with the Indian Tribes, nor was the sale effected for the Tribes through any agency of theirs. The Secretary effected these sales under the authority vested in him by the Act. Any sale by the Secretary in accord with the provisions of the Act was binding upon the Tribes without their approval or consent.

It was held in the *Algoma* case that the United States did not assume any contractual obligation to purchasers of the timber and no imlpied obligation on its part arose from the performance of its functions as protector of the Indians. In the instant case, however, the Act, regulations and advertisements specifically provide that certain credits shall be given to the lessees who purchased the deposits embraced in leases held by them. Here we clearly have a contractual obligation assumed by the United States to make those credits.

In the concluding paragraph of the *Algoma* case it is stated:

> "Since none of the contracts in suit were contracts or obligations of the United States, it is plain that receipt, by the Treasury of the United States, of payments made under them to the Superintendent for 'the use and benefit' of the Indians, even though made under protest, gave rise to no contract for repayment implied in fact on the part of the United States, and that the cause of action,

> if any, is not within the jurisdiction of the Court of Claims."

An altogether different factual situation exists in the present case. The proceeds from the tribal contracts in the *Algoma* case were deposited in the Treasury of the United States to the credit of the Klamath Indians. In the present case, however, the amount of the last installment, $69,244.26, was paid under protest. This money has never been deposited in the Treasury of the United States to the credit of the Choctaw and Chickasaw Nations, but was taken up in a Special Deposit Account of D. Bruddus, Cashier, and placed on deposit with the Treasurer, where it now remains, subject to his check at any time. (R. 73). This money being on deposit with the Treasurer and not having been placed to the credit of the Tribes is available for the payment of the refund to which Petitioners are entitled. The Respondent is obviously in error in stating that, "Even more important, all monies accruing from these transactions became the property of the Choctaw and Chickasaw Indians and were deposited in the Treasury to their credit. (Page 7 Respondent's Brief in Opposition)".

The Respondent attempts to make a distinction between the Klamath Indians' right of occupancy in the *Algoma* case and the fee simple title of the Choctaw and Chickasaw Indians in the present case. The courts are uniform in holding that Congress has the paramount power to manage, control, or dispose of Indian tribal properties, regardless of whether the Indian Tribes have merely the right of occupancy or fee simple title. *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Ligon* v. *Johnston*, 164 Fed. 670; *United States* v.

Creek Nation, 295 U. S. 103; *Globe Indemnity Company* vs. *Bruce*, 81 Fed. (2d) 143; *United States* v. *Colvard*, 89 Fed. (2d) 312.

Section 4 of the Act of February 8, 1918, declares that, under conditions specified, "if any lessee, becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate." The provision is mandatory, expressed in terms of the right of the lessee purchaser, which is inseparable from the correlative obligation of the United States. The present suit to recover these credits is thus upon claims "founded upon a law of Congress" and is within the jurisdiction conferred upon the Court of Claims. *Dismuke* v. *United States*, 297 U. S. 167; *United States* vs. *Commonwealth Title Insurance & Trust Company*, 193 U. S. 651; *United States* v. *Laughlin*, 249 U. S. 440; *Campbell* v. *United States*, 107 U. S. 407.

PETITIONERS' CLAIMS ARE MERITORIOUS.

This proposition has been fully presented in Petitioners' brief in support of their petition for a writ of certiorari, but in view of Respondent's reference to two opinions of the Attorney General (36 Op. A. G. 473 and 35 Op. A. G. 259), Petitioners feel justified and deem it proper to attach, and they do attach, as Appendixes 1 and 2, the opinions of the Solicitor for the Department of the Interior dated May 28, 1924, and

November 22, 1930, respectively, in which the Solicitor ruled favorably upon claims identical with those here presented.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari, and thereafter reviewing and reversing said decision.

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